No. 18-489

In The Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE EUGENE WEDOFF (RET.), THE HONORABLE LEIF CLARK (RET.), AND A GROUP OF LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The amici curiae, whose names are set forth below, include two retired United States bankruptcy judges and a group of law professors. Your amici teach courses on bankruptcy law, conduct research, and are frequent speakers and lecturers at seminars and conferences on bankruptcy law. Our interest in submitting this brief is to assist the Court by pointing to relevant legal scholarship and empirical studies that demonstrate the central importance of the discharge provisions of the U.S. Bankruptcy Code.[2] We are concerned that the decision by the Ninth Circuit, by undercutting the discharge, will significantly weaken the protection of the discharge provisions of the Code and will thereby cause unwarranted financial injury both to individual debtors and to the larger economy.

The Honorable Eugene Wedoff (ret.) served as a United States Bankruptcy Judge in the Northern District of Illinois in Chicago from 1987 to 2015 and as Chief Judge from 2002 to 2007. Judge Wedoff was formerly a partner at Jenner & Block. He served as chair of the Advisory Committee on Bankruptcy Rules from 2004 to 2014 and as a governor, secretary, and president of the National Conference of Bankruptcy Judges

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[1] Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondents received notice of the intent to file this brief more than ten days before its due date and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission.

[2] 11 U.S.C. §§ 101 *et seq.* (the "Code").

through 2015. He is the immediate past president of the American Bankruptcy Institute.[3] He is a Fellow of the American College of Bankruptcy and a member of the National Bankruptcy Conference.

The Honorable Leif M. Clark (ret.) served as a United States Bankruptcy Judge for the Western District of Texas from 1987 to 2012. Prior to that, he was a partner with Cox & Smith (now Dykema Cox Smith). He served on the endowment boards for both the American Bankruptcy Institute and the National Conference of Bankruptcy Judges, evaluating grant requests for empirical work in bankruptcy. He assisted in developing and administering judicial training programs for judges in Central and Eastern Europe. He is a member of the American College of Bankruptcy and the National Bankruptcy Conference, and continues to speak on bankruptcy topics nationwide.

Professor Margaret Howard is the Law Alumni Association Professor of Law, Emerita, at Washington and Lee University School of Law, Lexington, Virginia. She holds a B.A. from Duke University, a J.D. and M.S.W. from Washington University in St. Louis, and an LL.M. from Yale University. She has served as the Scholar in Residence at the American Bankruptcy Institute, and as the American Bankruptcy Institute's Vice President in charge of the Research Grants Committee. She is a fellow of the American College of

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[3] The views set forth herein are the personal views of Judge Wedoff and the named amici and may not reflect any position of the American Bankruptcy Institute, which has not participated in this appeal.

Bankruptcy and the American Law Institute. Her publications include *A Theory of Discharge in Consumer Bankruptcy*, 48 Ohio St. L.J. 1047 (1987), and *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 Am. Bankr. L.J. 373 (1991).

Professor Bruce A. Markell is the Professor of Bankruptcy Law and Practice at Northwestern Pritzker School of Law, part of Northwestern University. He is a former bankruptcy judge and a former member of the Ninth Circuit's Bankruptcy Appellate Panel. He is a co-author of four casebooks in bankruptcy, contracts, secured transactions, and securitization. He is a founding member of the International Insolvency Institute, a member of the Board of Editors of Collier on Bankruptcy, an elected member of the American Law Institute, a conferee of the National Bankruptcy Conference, and a fellow of the American College of Bankruptcy, where he was the Scholar in Residence from 2013 to 2016.

Professor Michael D. Sousa is an Associate Professor of Law at the University of Denver Sturm College of law. He received his J.D. from Rutgers University School of Law, his LL.M. in bankruptcy from St. John's University School of Law, his Master's of Arts degree in anthropology from the University of Denver, and is currently pursuing a Ph.D. in sociology from the University of Colorado–Boulder. He is a member of the Advisory Board for the LL.M. in Bankruptcy Program at St. John's University School of Law and sits on the Editorial Boards for both the American Bankruptcy

Institute Law Review and the American Bankruptcy Law Journal.

Professor Jack F. Williams is a Professor of Law at Georgia State University and the Center for Middle East Studies, where he teaches and/or conducts research on bankruptcy and business organizations; mergers and acquisitions; and taxation and statistics. He is the Scholar in Residence of the Association of Insolvency and Restructuring and a fellow in the American College of Bankruptcy. He holds a B.A. in economics from the University of Oklahoma, a J.D. with High Honors from George Washington University National Law Center, and a Ph.D. in archaeology from the University of Leicester in Leicester, United Kingdom.

David R. Kuney has served as an Adjunct Professor at the Georgetown University Law Center, American University's Washington College of Law and at New York Law School. He was formerly a partner at the law firm of Sidley & Austin. He serves on the Board of Directors of the American Bankruptcy Institute. He is a fellow in the American College of Bankruptcy and the American College of Real Estate Lawyers.

The Ninth Circuit held that a creditor's knowing violation of the discharge injunction, arising under § 524 of the Code, cannot be punished by contempt if the creditor had a good faith, subjective belief that the discharge did not pertain to *its claim*. *Lorenzen v. Taggart* (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018). The court held that even an "unreasonable belief" can

satisfy the good faith standard. In effect, the court's ruling makes ignorance of the law a complete defense to a knowing violation of the discharge injunction. Because contempt may be the sole remedy for a violation of the discharge injunction,[4] this ruling is of great significance and is certain to restrict a debtor's ability to obtain relief from violations of the discharge injunction.

The Ninth Circuit's decision "creates a square conflict" among the circuits. (Pet. 11.) The Eleventh Circuit has stated that "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnor in complying with the order, but whether in fact their conduct complied with the order at issue." *In re Hardy*, 97 F.3d 1384, 1390 (1996) (citation omitted). Likewise, the First Circuit recently recognized as "settled law" that "a creditor's good faith belief . . . is not relevant to a determination of whether the violation was wilful [and hence subject to contempt sanctions]." *Internal Revenue Service v. Murphy*, 892 F.3d 29, 34 (1st Cir. 2018).[5] Similarly, the Fourth Circuit has held that a willful violation of the discharge "requires only that the acts

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[4] Various courts have held that the exclusive remedy for violation of the discharge injunction is a contempt proceeding. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 508 (9th Cir. 2002). *See also Cave v. Valley Collection Services, LLC*, 2015 WL 12938941 (D. Ariz. June 18, 2015).

[5] The First Circuit noted that by 1998 bankruptcy courts had begun applying the generally accepted definitions of "willful violations" of the automatic stays to violations of discharge orders. *Murphy*, 892 F.3d at 38, citing *In re Hardy*.

taken in violation of the injunction be intentional," and that "a good faith mistake is generally not a valid defense." *In re Fina*, 550 F. App'x 150, 154 (4th Cir. 2014).

Granting certiorari is of critical importance to more than the parties at hand. Nearly one million individuals seek bankruptcy relief each year.[6] It is the bankruptcy discharge that alters the often grim reality facing many bankruptcy debtors and restores them to being productive members of the economy. The "failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

Yet, the discharge would be lifeless without the injunction found in § 524, and the injunction itself would be toothless without the power to enforce it through contempt sanctions. To weaken § 524 by making the standard for contempt nearly unreachable is to strip the discharge of much of its core protection and so to neuter one of the most critical aspects of the consumer bankruptcy system.

Accordingly, your amici urge this Court to grant certiorari. The rule of law as stated by the Eleventh Circuit in *Hardy*, 97 F.3d 1384 is correct, and we urge its application upon consideration of the full merits.

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[6] The number of non-business bankruptcy filings in 2017, 2016, and 2015 was as follows: 770,901, 808,781, and 911,086, respectively. *March 2017 Bankruptcy Filings Down 4.7 Percent*, United States Courts (Apr. 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent.

SUMMARY OF THE ARGUMENT

Bradley Taggart's petition for a writ of certiorari correctly identifies the depth of the circuit split for imposing sanctions for violation of the discharge injunction under 11 U.S.C. §§ 524 and 105. We agree. This amicus brief presents substantial empirical evidence and scholarship that are not a principal part of the petitioner's brief, but which will be helpful to the Court in determining whether to grant the petition. Further, this brief demonstrates the importance of this appeal to many more parties than those before this Court and indeed, to the fundamental operation of the bankruptcy system.

First, the decision by the Ninth Circuit, in departing from the majority of other circuit courts, will cause harm to thousands of individual debtors who seek the fresh start granted by the bankruptcy discharge. A large body of empirical data and peer-reviewed scholarship demonstrate the value, need, and consequence of the bankruptcy discharge. The discharge is all that stands between thousands of debtors and an economic existence marginal at best. This empirical evidence fully supports enforcement of the bankruptcy discharge by a vigorous and meaningful contempt power. Resolution of the circuit split is required to protect this fundamental aspect of bankruptcy law.

Second, the Ninth Circuit's ruling will harm the effective operation of the bankruptcy system by permitting unwanted gamesmanship. Congress has already noted that institutional creditors often seek to

intimidate debtors into surrendering their valid discharge rights. *See* S. Rep. No. 1688 at 2-3 (1960) (Comm. Rep.). The decision will encourage facile challenges by aggressive creditors who will argue that despite express knowledge of the discharge order, they were somehow unaware that it applied to *their* claim and hence cannot be found in contempt. The decision removes most of the risk in a creditor's enforcing a discharged claim. This is because (a) the sole remedy for violating the discharge injunction may be a contempt proceeding, (b) the burden of proof to establish contempt and show a willful violation is high, and (c) the legal costs of pursuing a contempt proceeding are typically more than what a debtor can bear. All of this leaves debtors with a nearly insurmountable barrier to meaningful relief.

Third, the decision is contrary to the long-standing statements of this Court protecting the bankruptcy discharge. For over 100 years this Court has recognized the need for the legal system to be responsive to "the weight of oppressive indebtedness." *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55 (1915). This Court's landmark decision in *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934) held that the discharge is *both* a "fundamental private necessity" and a matter of "great public concern." Granting certiorari protects both.

Accordingly, the petition for writ of certiorari should be granted in order to resolve the circuit split by providing a uniform standard for establishing when

a creditor has acted in contempt of the discharge injunction.

LEGAL ARGUMENT

I. The Ninth Circuit departed from the uniform rule of the other circuits by holding that a creditor may pursue collection of a discharged debt as long as the creditor has even an "unreasonable belief" that the discharge does not apply.

A. The Ninth Circuit's decision created a circuit split.

The crux of this appeal is the Ninth Circuit's adoption of an unprecedented legal principle that if a creditor has an "unreasonable" but good faith belief that the discharge injunction does not apply to *its* claim, then its faulty understanding is a complete defense to the imposition of sanctions for its violation of the injunction. In short, the ruling by the Ninth Circuit makes ignorance of the law a defense to violating the discharge injunction, and thus impairs one of the core values of the Bankruptcy Code. The ruling leaves debtors with virtually no meaningful sanction against wrongful collection activities.

Discharge provisions are the heart and soul of bankruptcy for individual debtors. Over 200 years ago Sir William Blackstone wrote that through the discharge "the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own

industry, may become a useful member of the commonwealth." 2 *William Blackstone, Commentaries* *484.

This Court held much the same when it declared that one of the primary purposes of the Bankruptcy Act was to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from [oppressive debt] obligations." *Local Loan Co.*, 292 U.S. at 244. This purpose has "again and again [been] emphasized by the courts as being of public as well as private interest." *Id.* Indeed, the discharge was seen as a "fundamental private necessity." *Id.* at 245.

Local Loan further held that an attempt to collect a debt in violation of the discharge order could be enjoined by a bankruptcy court. *Id.* at 241. Congress codified *Local Loan's* discharge as injunction in 1970, declaring that "an order of discharge shall enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action . . . to collect such debts. . . ." Pub. L. No. 91-467, § 3, 84 Stat. 990, 991 (1970).

The 1978 Code carries forward the same notion of the central importance of the discharge and provides for injunctive protection. Section 727 of the Code provides that a bankruptcy court "shall grant the debtor a discharge" in the absence of exceptions inapplicable here. The discharge is broad. It "discharges the debtor from all debts that arose before the date of the [bankruptcy petition]." 11 U.S.C. § 727(b) (2018). Debtors are protected from interference by creditors with their

discharge by § 524, which states that discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor."

Section 524(a)(1) underscores the importance of the discharge by providing that a judgment obtained on a discharged debt is "void." By so doing, Congress has provided that the discharge is not merely an "affirmative defense" in a collection suit, but is an absolute, non waivable defense, and that any judgment obtained in violation of the discharge is void.[7] *See In re Gurrola*, 328 B.R. 158, 170 (B.A.P. 9th Cir. 2005).

Although Congress has not designated a specific sanction for a violation of the discharge injunction, Congress has granted the bankruptcy courts important powers to protect their jurisdiction. Under § 105(a) a bankruptcy court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." That a bankruptcy court may use the contempt power to protect its jurisdiction under § 105(a) is well established. *Walls*, 276 F.3d 502, 508 (stating that contempt is the "traditional remedy" and perhaps the sole remedy for discharge violations).

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[7] *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "This provision was designed 'to effectuate the discharge and make it unnecessary to assert it as an affirmative defense in a subsequent state court action.'" (citation omitted). *But cf.*, *Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008), discussed *infra*.

Here, the Ninth Circuit held that even the potentially exclusive remedy of contempt may be unavailable if a creditor can show merely that it acted with a good faith belief that the discharge injunction did not apply to its claims. The court came to this result in two steps. First, it held that clear knowledge of the discharge itself is not enough. "To justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Taggart*, 888 F.3d at 443 (citing *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)).

Second, the Ninth Circuit departed from settled law by holding that even an unreasonable belief that the discharge does not apply is a complete defense. "Additionally, the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 444 (citing *Zilog Inc. v. Corning* (*In re Zilog, Inc.*), 450 F.3d 996, 1009 n.14 (9th Cir. 2006)). In so ruling, as noted above, the Ninth Circuit failed to follow the majority rule followed in the First, Fourth and Eleventh Circuits.[8]

Nothing in the Code's language nor legislative history is cited in support of the Ninth Circuit's holding.

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[8] In the similar context of the automatic stay, the majority of decisions have rejected the approach of the Ninth Circuit and have held exactly to the contrary, stating a "creditor's 'good faith' belief that he is not violating the automatic stay provision is not determinative. . . ." *IRS v. Murphy*, 892 F.3d at 38; *Knupfer v. Lindblade* (*In re Dyer*), 322 F.3d 1178, 1190-91 (9th Cir. 2003).

The Ninth Circuit relied entirely on an earlier circuit decision, *Zilog*, for this proposition. Yet, *Zilog's only* reference to an "unreasonable" belief as a defense is found in a footnote discussing the standard applicable on remand. *Zilog*, 450 F.3d 1009 n.14. The footnote itself contains no discussion and no citation to authority. Yet, the Ninth Circuit in *Zilog* cited *Hardy* with approval, 450 F.3d at 1008, n.12, and *Hardy* rejects the very principle found in the foonote. 97 F.3d 1384 at 1390.

The Ninth Circuit's ruling has now made a finding of contempt unlikely despite a creditor's serious misconduct, including even inexplicable carelessness in assessing its legal obligations. There is no reason to conclude that such an outcome was intended by Congress and it is for good reason that the other circuit courts have not created such a rule.

B. The Ninth Circuit's decision impairs the core financial benefit of the bankruptcy discharge and injures the "fresh start" of bankruptcy.

The bankruptcy discharge for individual debtors is central to the operation of the bankruptcy system; yet the Ninth Circuit's decision impairs the core economic benefit of the discharge for individual debtors. "[T]he introduction of the discharge [into modern bankruptcy law] could well be considered the single most important event in bankruptcy history." Charles J. Tabb, *Bankruptcy Anthology* 524 (2002). Indeed, commentators have observed that the bankruptcy

discharge "ranks ahead in importance of all other [provisions] in Anglo-American bankruptcy history. . . ." John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163, 164 (1996). The discharge is the "crown jewel of [bankruptcy] legislation." F. Regis Noel, *A History of the Bankruptcy Law* 200 (1919).

A substantial body of scholarship and empirical evidence demonstrates the number of ways in which the discharge is of vital importance to both the individual debtor and to the larger economy.[9] First, those who file for bankruptcy relief and seek the discharge are in desperate need of relief, are not "can pay" debtors and suffer serious stigma from the filing. Empirical data demonstrates that the typical individual debtor turns to bankruptcy due to a serious economic plight, and not as a result of misconduct, over-spending, or other non-productive economic behavior. "[W]hen bankrupt debtors as a group are compared to the general population, their situations are grim." Teresa A. Sullivan, et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 77 (1999). The authors found that debtors have "staggering debts in relation to their

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[9] While some of the articles are twenty years old, their influence continues to the present day, and their underlying insights remain valid. *See generally* Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 Am. Bankr. Inst. L.Rev. 217 (2018) (hereafter "Sousa") (collecting prominent research articles and substantial data bases on discharge issues).

income" and are a "segment of America in financial collapse." *Id.*[10]

Second, the decision to file for bankruptcy is usually the result of oppressive debt obligations, including catastrophic medical problems such as cancer, automobile and industrial accidents, and age-related issues.[11] When asked why they filed for bankruptcy, 67.5 percent of debtors reported job loss, 19.3 percent cited a medical event, and 22.1 percent listed family concerns (i.e., divorce for example) as contributing factors. Teresa A. Sullivan, et al., *The Fragile Middle Class: Americans in Debt*, 16 fig. 1.2 (2000). These Americans file for bankruptcy not because it is "an easy way out," but because they have run out of options. Teresa A. Sullivan, et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L.Rev. 1091, 1138 (1983). In other words, "[f]ew people file bankruptcy without crushing debts." Sousa, *supra* at 226.

The filing for bankruptcy is traumatic and causes feelings of stigma and shame.[12] According to empirical

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[10] "The economic profile of debtors [in their study] demonstrated that the later group was in far worse financial trouble than their earlier counterparts as measured by, among other variables, debt-to-income ratios and the amount of average unsecured debt." Sousa, *supra* at 228.

[11] Maurie Backman, *This Is the No. 1 Reason Americans File for Bankruptcy*, The Motley Fool (May 1, 2017) https://www.fool.com/retirement/2017/05/01/this-is-the-no-1-reason-americans-file-for-bankrup.aspx.

[12] "There is robust literature in the social sciences regarding the association between socioeconomic disadvantage and mental

data collected by Professor Michael D. Sousa, most of the debtors he interviewed "experienced deep feelings of shame, embarrassment and instances of stigmatization." Sousa, *supra* at 230. Indeed, "bankruptcy stigma appears to have increased over the past four decades. . . ." *Id.* at 235. "[S]tigma has increased and the rising numbers of filings are actually the net result of two opposing trends—economic forces may have pushed more families to the brink of bankruptcy, while increasing stigma may have prevented ever more distressed families from filing." *Id.* at 239 (citing Teresa A. Sullivan, et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L.Rev. 213, 228-33 (2006)).

Discharge is vital in a third respect: it has shown a demonstratable effect in restoring debtors to a productive role in the larger economy. Indeed, "the average person who files for bankruptcy to relieve financial stress catches up with their peers." Jay L. Zagorski & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?* 16 Am. Bankr. Inst. L.Rev. 283, 289 (2008).[13] "None of the data indicate that over time the size of the financial gap

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health, including suicide. . . . [T]he more debt an individual possessed the more likely that he or she suffered from mental disorder, neurosis, psychosis, alcohol dependency or drug dependency." Sousa, *supra* at 232 (citations omitted).

[13] *See also* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L.Rev. 67, 87 (2006) ("The majority, 65% of families, reported that their financial situations had improved since they filed bankruptcy.").

between bankruptcy filers and non-filers either gets wider or stays the same; for the most part, the size of the financial gap between these two groups narrows over time." *Id.* at 307.

Fourth, without bankruptcy discharge, only a small fraction of debtors has any hope of repaying their debt outside of bankruptcy. Even those debtors who voluntarily attempted repayment in Chapter 13 were in abysmal shape: at most, only about a third were able to complete their repayment plans, and a significant portion of those debtors were making only minimal repayments. *See* Teresa A. Sullivan, et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121, 123 (1994).

Discharge benefits both debtors and the larger macro economy. "The theory is that society as a whole benefits when an overburdened debtor is freed from the oppressive weight of accumulated debt. The debtor then is able to resume his or her place as a productive member of society." Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364-65 (1991). "Bankruptcy law . . . serves significant macroeconomic goals[;] . . . the Chapter 7 debt discharge prevents the development of an insolvent underclass. . . ." Amber J. Moren, Note, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594, 1618 (2013).

Ultimately, empirical data show that "bankruptcy laws are generally serving the people they were

designed to serve: people in serious, even hopeless financial trouble, who need either a fresh-start discharge from their debts or at least some [breathing spell]." Sullivan, *As We Forgive Our Debtors*, *supra* at 77. Conversely, the failure to obtain a discharge is often catastrophic. "The consequences to a debtor whose obligations are not discharged are considerable; in many instances, failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d at 66.

II. The Ninth Circuit's decision will harm the just functioning of the bankruptcy judicial system and encourage abusive creditor conduct.

A separate justification for granting the petition for a writ of certiorari is that the Ninth Circuit's decision will permit, if not encourage, abusive creditor conduct. It will do so by eliminating much of the risk facing a creditor inclined to disregard the discharge injunction and initiate a civil suit on a discharged claim. If a debtor objects, a creditor can readily plead lack of knowledge that the discharge applied to its claim. Thus, instead of merit based resolutions, the system will allow under-represented and *pro se* debtors to be intimidated into surrendering their opportunity for a fresh start.

There are many factors which induce creditors to file claims even with knowledge of the discharge. First, Congress intended to "make it unnecessary to assert

[discharge] as an affirmative defense in a subsequent state court action." *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "The purpose of the provision [§ 524] is to make it absolutely unnecessary for the debtor to do anything at all in the collection action." *Id.* at 373. Despite this mandate some state statutory enactments still identify discharge as an affirmative defense and some courts seem to make statements that vary from the federal law. *See, e.g.*, *Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008); *see also* Tex. R. Civ. P. 94 ("In a pleading to a proceeding a party shall set forth affirmatively . . . discharge in bankruptcy. . . .").

It has often been noted that individual debtors are unlikely to appear and defend against collection suits, regardless of a valid defense. Justice Sotomayor observed this in a similar context, noting that consumer debtors often permit the entry of default judgments, regardless of the merits of a claim; institutional debt collectors take advantage of this. "[C]onsumers do fail to defend themselves in court—in fact, according to the FTC, over 90% fail to appear at all. . . . The result is that debt buyers have won 'billions of dollars in default judgment' by simply filing suit and betting that consumers will lack the resources to respond." *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407, 1417 (2017) (Sotomayor, J. dissenting).[14]

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[14] This observation is supported by the empirical literature. *See generally* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L.Rev. 179 (2014).

Moreover, the burden of proof is a substantial barrier for debtors who seek to enforce the discharge injunction in bankruptcy court. The Ninth Circuit held that "the moving party [the debtor] has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *In re Taggart*, 888 F.3d at 443. *See also In re Dyer*, 322 F.3d at 1190. Further elaborating, the court stated that "to justify sanctions the movant [the debtor] must prove that the creditor (1) *knew* the discharge injunction was applicable and (2) *intended* the actions which violated the injunction." *Id.* (emphases added).

Thus, the debtor's burden includes specific showings of "knowledge" of the injunction and "intent" to commit the violative acts; both elements embrace highly subjective states of mind and both must be shown by clear and convincing evidence. Under the clear and convincing standard the debtor must "place in the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence [the non-moving party] offered in opposition.'" *In re Taggart*, 548 B.R. at 288 n.11 (citation omitted).

Assuming the debtor somehow shows the requisite intent and knowledge, the burden then shifts to the creditor, who can prevail by merely showing "good

faith."[15] One may fairly question how the typical individual debtor can realistically rebut an institutional creditor's subjective claim of good faith. Bad faith cannot be inferred from knowledge of the bankruptcy alone. *In re Taggart*, 888 F.3d at 443. An unreasonable belief that a creditor was not barred from suing on a discharged claim will often be easily created, and it is difficult to imagine how a debtor could satisfy its burden in refuting good faith, absent an unlikely "confession" by the creditor

Finally, burden aside, the cost and time to litigate the creditor's state of mind can be well beyond what an individual debtor can bear. The subjective standard of "good faith" would require the debtor to engage in costly discovery, some of which is likely to be resisted. Individual debtors frequently lack the resources to pay legal counsel to defend against discharge litigation, as Congress well knows. Beginning in at least 1960, Congress became aware that the discharge provisions were being manipulated by institutional creditors who were able to intimidate even honest debtors into surrendering their discharge in order to avoid litigation. Prior to enactment of the 1978 Code, the House Judiciary Committee noted that "[t]he threat of litigation over this [discharge] exception and its attendant costs are often

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[15] This is precisely what occurred below. The bankruptcy court concluded that the respondents "knowingly violated the discharge injunction." *In re Taggart*, 888 F.3d at 444. The bankruptcy court found that a good faith belief that the discharge was inapplicable was irrelevant. *Id.* The BAP, however, held that a good faith belief was determinative. *Id.*

enough to induce the debtor to settle for a reduced sum, in order to avoid the costs of litigation" even with respect to "marginal cases." H. Rep. No. 95-595 (1977).[16] *See also* Andrew F. Emerson, *So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy*, 92 Am. Bank. L.J. 111, 118–123 (2018).

Debtors are unlikely to be able to rely on their Chapter 7 counsel to represent them in discharge litigation. Lawyers have no duty to do so. Legal counsel for Chapter 7 debtors frequently "unbundle" their legal services and decline to undertake representation of the debtor in an adversary proceeding challenging the discharge. "Unbundling" allows an attorney to limit the scope of his or her representation by excluding expensive tasks like adversary proceedings from their general services. Chapter 7 debtor counsel have no obligation to represent the debtor post-discharge if a civil suit is filed in state court to collect on a discharged claim. Debtors who appear *pro se* have less favorable outcomes in judicial proceedings.[17]

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[16] *See also* William F. Stone, Jr. & Bryan A. Stark, *The Treatment of Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render*, 82 Am. Bankr. L.J. 551, 555 n.25 (2008).

[17] *See, e.g.*, Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5 (2009); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L.Rev. 1933, 1957 (2011) ("The percentage of pro se cases rose statistically significantly,

Conversely, intuitional creditors are typically well-armed with counsel. The plaintiff in such suits is frequently not the original creditor, but one of the "bottom fishers" who buy consumer debt for pennies on the dollar, and often file suits despite facial defects.[18] These institutional creditors are well funded and are often willing to bet that consumers will lack the resources to protect their rights. *See id.* ("The clearest trend, repeatedly highlighted in the literature, is that defendants often do not respond to collection suits.") Holland, *Junk Justice*, *supra* at 227.

III. The Ninth Circuit's decision is inconsistent with this Court's bedrock concept that the bankruptcy discharge is a matter of personal liberty and of great public concern.

This Court has consistently emphasized that the bankruptcy discharge is of profound public and private importance. In 1915 this Court correctly perceived the need to have a legal system that restores debtors to productive participation in the economy. *See Williams v. United States*, *supra*. 236 U.S. 549, 554-55. In 1918, this Court emphasized the "great public interest" in protecting the discharge. *Stellwagen v. Clum*, 245 U.S. 605, 617.

Local Loan, in 1934, recognized that the discharge protects the power of an individual to earn a living, and

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especially among lower-income debtors, while the percentage of these cases ending with a discharge of debt declined.").

[18] *See generally* Holland, *Junk Justice*, *supra*; *Midland Funding*, 137 S.Ct. 1407 (2017).

thus to function in society as a productive person. "The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right." The need to provide for, and then protect, the bankruptcy discharge, remains a bedrock concept that has inhered in bankruptcy jurisprudence for almost 100 years. It has guided Congress and found clear expression in legislative history and the 1978 Code. It is entirely consistent with modern scholarship and empirical data.

Standing apart from this unbroken view, the Ninth Circuit's decision would eviscerate the discharge injunction by requiring the debtor to prove the nearly unprovable; namely, the subjective intent of an institutional creditor whose conduct is shielded by layers of faceless employees and who would be free to act in a fashion that fails to meet an objective standard of good faith.

Unless the Ninth Circuit's decision is reversed, bankruptcy courts will be forced to do exactly what Justice Sotomayor warned against; namely to "engage in novel and unfettered inquiries into a 'creditor's state of mind.'" *Midland*, 137 S.Ct. at 1419 n.5. The Ninth Circuit's decision is untethered to legislative history or any language in the Code. By accepting certiorari this Court can now provide for a uniform rule, already followed by a majority of the circuits, and thus protect what has been sound wisdom and jurisprudence for nearly a century.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant the petition for writ of certiorari.

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Respectfully submitted,

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